

EXHIBIT B

REBUTTAL EXPERT REPORT OF
PHILIP D. DREGGER
CONCERNING U.S. PATENT 6,357,193 B1

Diversi-Plast Products, Inc. v. Battens Plus, Inc.
United States District Court for the District of Utah
Civil Action No. 2:04-CV-01005 PGC

I. INTRODUCTION

A. Scope of Report

I have been asked by the attorneys for Battens Plus, Inc. ("Battens Plus") to review and comment on the Expert Report on Infringement prepared by Steve Carpenter dated January 16, 2006 (hereafter Carpenter) concerning U.S. Patent No. 6,357,193 B1 ("the '193 Patent").

Specifically, but not exclusively, I was asked to provide opinions regarding some of the report's arguments regarding infringement by Battens Plus's BattenUp batten product of claim 2 of the '193 Patent.

I reserve the right to supplement this Report to evaluate different claims of the '193 Patent should they be asserted by Diversi-Plast. In addition, I reserve the right to supplement this Report should the United States Patent and Trademark Office grant Diversi-Plast any such claims in the currently pending Reissue / Reexamination proceeding. I also reserve the right to supplement this Report should the court issue a claim construction ruling defining claim terms.

B. General Background

This report includes by reference information contained in Introduction sections B, C, D, E, and F of the my Opening Expert Report dated January 17, 2006.

II. LEGAL STANDARDS

- A. Literal Infringement - It is my understanding that to determine whether the BattenUp batten literally infringes claim 2 of the '193 patent, I must compare that patent claim with the BattenUp batten to determine whether each element of the claim is present in the batten. If so, then the BattenUp batten infringes that claim.
- B. Infringement Under The Doctrine of Equivalents - I have been informed that a Patent may also be infringed under the doctrine of equivalents. As Mr. Carpenter does not render an opinion on this theory of infringement, I will not address it in this Report, but reserve the right to do so should it become an issue.

III. OPINIONS

In my opinion, the BattenUp batten does not infringe Claim 2 of the '193 patent for the following reasons:

- A. Claim 2 is Indefinite -Diversi-Plast submitted a Consent of Assignee to Reissue and Statement Under 37 C.F.R § 3.73(b) dated June 28, 2004 (DP Exhibit 14). Paragraph 10, page 3 of Diversi-Plast's Exhibit 14, states that the '193 patent is "wholly or partly defective by reason of a defective specification. In one instance of a defective specification, claim 2, before being amended, recited 'the second ply includes a multiplicity of cross plies extending between the first plies.'"

- i. "Claim 1, from which claim 2 directly depends, recites 'a generally planar first ply and a second ply,'"
- ii "Hence, claim 2 is indefinite because it is impossible for a multiplicity of cross plies to extend between a single first ply, as recited in claim 1."

I concur with paragraph 10 for the reasons stated therein. I am informed by Battens Plus attorneys that an indefinite claim can not be infringed.

- B. **Claim 2 is Not Understandable To A Person of Ordinary Skill**¹ – Claims-1 and 2 of the '193 Patent include the terms "ply," "plies," "cross-plies," "second ply," and "first plies." Carpenter does not define these terms and states in his first paragraph under Statement of Opinions that "All of the language used in claim 2 is understandable after reading the '193 Patent. None of the claim language requires any special understanding or meaning." Carpenter does not offer an explanation as to how he can deem the claim is "understandable" in light of the admitted "indefinite" and "impossible" nature of claims 1 and 2 as discussed in item A above.

In my opinion, the language of claim 1 and claim 2 would not be understandable to a person of ordinary skill in the art of tile roofing after reading the '193 Patent without some special understanding or meaning given to the terms.

Ply, Plies, Cross-Plies, First Plies, and Second Ply – The terms "ply," "plies," "cross-plies," "second ply," and "first plies" are used in claim 1 and claim 2 of the '193 patent and are not defined in the '193 patent or by Carpenter. In my opinion, a person with ordinary skill in the art of tile roofing would not be able to put together consistent workable definitions for these terms, based on the context in which these terms are used in the '193 specification without some special understanding or meaning given to the terms.

- o When used in the context of the tile roof industry, the term "ply" means one generally planar layer (ply) of at least two generally planar layers (plies) of a material that when adhered or placed together form a distinct unit. For example, in certain modestly sloped tile roofs, a "2-ply" underlayment membrane is installed below the tile. The term "ply" as applied to this example means 2 layers (plies) of a weather-resistant sheet material were installed flat over a roof deck and over each other, in the same direction, and cemented together prior to installing an exterior roof covering.
- o Plywood often serves as the roof deck for tile roofs and on rare occasions,

¹ A person of ordinary skill in the relevant art in this case is a person with at least 3 years of experience with design, specification, or evaluation of tile roofs including battens.

plywood is cut in strips to serve as battens for roof tile. The term ply as applied to "5-ply" plywood means 5 layers (plies) of a wood veneer that were laid flat over each other and glued together, forming one piece of plywood. The term "cross plies" when applied to plywood means that one or more plies in plywood (the cross plies), were still installed flat over one of the other layers but that the grain of that layer was oriented 90° (i.e., cross) to the direction of the grain in another layer.

- Claim 1 states the batten is comprised of "first and second plies" that "cooperate to define a multiplicity of passages." Within the context of how the term "ply" is used in the tile roof industry, I do not believe a person with ordinary skill would be able to understand how a batten comprised of first and second plies could cooperate to form passages. This is true because the plies, including cross plies, are expected to be generally planar, comprised of the same materials, and installed flat over each other. There is no provision for plies to cooperate to form passages in such a context.
- Claim 2 states the "second ply includes a multiplicity of cross plies extending between the first plies." Figure 5 depicts planar plies 52 and 54 and second ply 62. Second ply 62 is described in the specifications (page 3, lines 19-23) as including a "multiplicity of cross-plies" and that the "cross-plies extend generally perpendicular (or otherwise transversely) between planer plies 52 and 54." Within the context of the tile roof industry, I do not believe a person with ordinary skill would be able to understand how a singular ply of material, a "second ply," could be made up of a multiplicity of generally perpendicular cross plies, apparently held together only by air. This is true because a ply is considered to be comprised of a contiguous layer of material. In addition, a person would not be able to understand how any construction could have more than one "first" ply. This is true because only one layer can be the "first." The same material can comprise the 3rd or 5th plies, but only one can comprise the "first" ply. Apparently, the term "first ply" has a separate meaning. In addition, the term "second ply" apparently has two meanings. One as described above related to Figure 5 and a separate meaning as applied to Figure 4, where the second ply is continuous and convoluted.

The terms "ply," "plies," "cross plies," "first ply," and "second ply" as used in the '193 patent apparently have special understandings and meanings. As stated in my January 17, 2006 report, some sort of practical understanding of these terms is needed to proceed with discussions. Based on the '193 specification and figures, the term "ply" apparently means a layer of material generally planar or convoluted and discreet or continuous. The term "first plies" apparently means any material with a planar surface, as depicted as elements 52 and 54 in, for example, Figure 4. As depicted in Figures 4 and 5, "second ply" apparently means a material that is either convoluted or straight and either continuous or discreet; and that extends

between and cooperates with two generally planar surfaces to form passages. The term "cross plies" apparently means a material within the meaning of the term "second ply" that extends generally perpendicular or otherwise transversely between two generally planar surfaces.

As shown above, the term "ply," "plies," "cross-plies," "first ply," and "second ply" would not be understandable to a person of ordinary skill in the art of tile roofing after reading the '193 Patent without some special understanding or meaning given to the terms. Therefore, claims that use these terms can not be understood by persons having ordinary skill in the art.

Based on my understanding of the legal standards for infringement, a claim that cannot be understood by a person of ordinary skill in the art is indefinite and therefore invalid, and consequently cannot be infringed.

- C. **Claim 2 Is Not Applicable To The BattenUp Product** – Assuming that a person having ordinary skill in the art would be able to understand Claim 2, that person would interpret the Claim to exclude an extruded product. Claim 2 describes a batten in which "the second ply includes a multiplicity of cross plies extending between the first plies." Simply put, Claim 2 requires plies.

According to the ICC Evaluation Services, Inc., ES Report ER-6106, page 1, item 2.2.1 Battens (See Exhibit D of the Dregger Opening Expert Report, item 10), the BattenUp battens is an extruded product, it is "made from extruded polypropylene." Extruded products do not have plies. They can be made into various shapes but they are extruded as a single piece. The photos included in Exhibit C of the Carpenter report clearly show that the top, bottom, and cross ribs of the BattenUp product are comprised of a single piece of extruded plastic.

I am informed by Battens Plus attorneys that a product can not infringe on a claim if an element of that claim is not present in that product. The BattenUp batten product does not contain the claim 2 elements of "second ply" or "first plies."

- D. **Claim 2 is Invalid** - Assuming the claim construction employed by Mr. Carpenter, Claim 2 of the '193 patent is not valid because it is obvious and anticipated as explained in my January 17, 2006, Opening Expert Report. I am informed by Battens Plus attorneys that an invalid claim can not be infringed.

Dated: February 13, 2006


Philip D. Dregger, PE

CASE TITLE: *Diversi-Plast Products, Inc. v. Battens Plus, Inc.*
COURT/CASE NO: USDC, Central District of Utah, No. 2:04CV1005 PGC

CERTIFICATE OF SERVICE

I am employed in the County of Sacramento; my business address is 555 Capitol Mall, 9th Floor, Sacramento, California. I am over the age of eighteen years and not a party to the foregoing action.

On February 13, 2006 I served the within:

**REBUTTAL EXPERT REPORT OF PHILIP D. DREGGER
CONCERNING U.S. PATENT 6,357,193 B1**



(by mail) on the party(ies) listed below by placing a true copy thereof enclosed in a sealed **envelope** in a designated area for outgoing mail, addressed as set forth below. At McDonough Holland & Allen PC, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business, in a United States mailbox in the City of Sacramento, California.

Matthew G. Bagley
KESLER & RUST
36 South State Street, Suite 2000
Salt Lake City, Utah 84111
Telephone: (801) 532-8000
Facsimile: (801) 531-7965
*Counsel for Plaintiff Diversi-Plast
Products, Inc.*

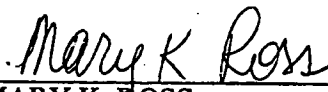
Tye Biasco
PATTERSON, THUENTE,
SKAAR & CHRISTENSEN, P.A.
4800 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2100
Telephone: (612) 349-5740
Facsimile: (612) 349-9266
*Co-Counsel for Plaintiff Diversi-Plast
Products, Inc.*



by facsimile transmission, in accordance with Code of Civil Procedure § 1013(e), to the following party(ies) at the facsimile number(s) indicated.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 13, 2006, at Sacramento, California.



MARY K. ROSS